No. 107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SEA-LAND SERVICE, INC., *Appellant*

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, ET AL., *Appellees*

On Appeal From the United States District Court for the District of Connecticut

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JURISDICTIONAL STATEMENT

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Appendix C

Rates, costs, and cost ratios

[Rates and costs in cents per 100 pounds; ratios in percents; min. weights in 1,000 pounds; SL is Sea-Land; OP is out-of-pocket; FD fully distributed; PA is Pan-Atlantic; MC is motor carrier; AR is all-rail]

Commodity	Origins and destinations	SL		OP costs			FD costs			Ratio SL rates to costs		AR rate and costs		OP	FD	Ratios SL to AR costs	
		Min.	Rate	PA	MC	SUM	PA	MC	SUM	OP	FD	Min.	Rate			OP	FD
Sewer pipe	Sherman, Tex., to Clearwater, Fla	[1] 52	124	59	53	112	68	69	137	111	91	36	133.5	88	114	127	120
Bottle caps	New York, N.Y., to Jacksonville	30	125	67	52	119	77	72	149	105	84						
Paper fabric bags	New Orleans, La., to Orlando, Fla.	22	130	58	23	81	68	34	102	160	127						
Rosin	Cross City, Fla., to New York, N.Y.	36	105	63	23	86	72	37	109	122	96						
Canned goods	Fort Pierce, Fla., to Brewster, N.Y.	40	104	44	42	86	51	66	117	121	89						
Petroleum	Baton Rouge, La., to Miami, Fla	26	117	40	62	102	46	88	134	115	87						
Paper boxes	Miami, Fla., to Philadelphia, Pa	36	108	51	25	76	59	37	96	142	113						
Ammunition	Bridgeport, Conn., to Alexandria, La.	30	289	68	60	128	79	84	163	226	177						
Canned goods	Fort Pierce, Fla., to New York, N.Y.	40	94	57	22	79	68	33	101	119	93						

[1] 26,000 pounds are used as load per trailer when two trailers used for 52,000 pounds.

NOTE.—Rail costs are shown for those movements where protestants introduced rail costs. Rail costs are adjusted to reflect loss and damage claim payments, shown in Bureau of Accounts, Cost Finding and Valuation Statement No. 2-58, applicable to the commodities in question.

INDEX

Table of Cases

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Connecticut is reported at 199 Fed. Supp. 635. The final judgment of that court is dated January 8, 1962. The decision of the Interstate Commerce Commission dated December 19, 1960 is reported

at 313 I.C.C. 23. The opinion and judgment below, and the report of the Commission have been reproduced as Appendices A, B, and C, respectively, to the Jurisdictional Statement herein of appellant Interstate Commerce Commission.

JURISDICTION

This action was brought under 28 U.S.C. 1336 to set aside and enjoin an order of the Interstate Commerce Commission. The judgment of the district court was entered on January 8, 1962 and appellant Sea-Land Service, Inc., filed its Notice of Appeal in that court on March 9, 1962. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Virginian Ry. Co.* v. *United States*, 272 U.S. 658; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125.

STATUTES INVOLVED

The statutes involved, the National Transportation Policy and 49 U.S.C. 15(7) and 15a(3) are set forth in the Appendix attached hereto.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether, under Section 15a(3) of the Interstate Commerce Act and the National Transportation Policy, the Commission may find not shown to be just and reasonable, and require cancellation of, certain reduced railroad trailer-on-flatcar rates, which are compensatory (i.e., exceed the railroads' out-of-pocket costs in all instances and their fully-distributed costs in many instances) but represent substantial reductions

from levels maintained elsewhere, to the same levels of the rates of the coastal water carriers and are applicable only to points served by the coastal water carriers, where the water carriers' service cannot compete at equal rates with the railroads' service and where the reduced rail rates are part of a program of rail rate reductions which threatens the continued existence of the coastal water carriers?

2. Whether, under the foregoing circumstances, the Commission may find such rail rates to be unlawful without finding as a controlling consideration that the competing water carriers are the low cost mode of transportation?

3. Whether, if the Commission must make such a finding, it must do so in terms of the "integral overall rate structure" of the competing modes of transportation?

4. Whether, if the Commission must make such a finding, it is precluded from rejecting any rail rate for a particular movement which yields the railroad's fully-distributed cost which is lower than the fully-distributed cost of the competing water carrier?

STATEMENT OF THE CASE

This action was brought by the New York, New Haven and Hartford Railroad Company and other railroads to enjoin an order of the Interstate Commerce Commission dated February 3, 1961, and a report dated December 19, 1960, (313 ICC 23) directing them to cancel substantial rate reductions with respect to 66 movements in their trailer-on-flat car (TOFC) service between points in the East and Texas. The two competing water carriers, Sea-Land Service, Inc.

(hereinafter called Sea-Land), and Seatrain Lines, Inc. (hereinafter called Seatrain) protested the proposed rates before the Commission, and appeared before the lower court to defend the order below. The United States and the Interstate Commerce Commission also appeared in the lower court and defended the order. The complaint attacked the Commission's determination that the TOFC rates at issue are unjust, unreasonable, and unlawful primarily on the ground that such a finding is precluded by the provisions of Section 15a(3) of the Interstate Commerce Act (49 USC § 15a(3)).

The court below in its judgment entered January 8, 1962, set aside and vacated the above described report and order of the Commission, entered December 19, 1960, and February 3, 1961, respectively, to the extent that they found unlawful and unreasonable the trailer-on-flat car rates at issue, without prejudice to such further proceedings as the Commission may deem appropriate.

The following facts, as found by the Commission in its report, appear not to have been contested by the railroads before the district court:

1. That the reduced railroad trailer-on-flatcar rates at issue represent substantial reductions from levels maintained elsewhere;

2. That these rates were published solely for the purpose of establishing a basis of rates exactly equal to those maintained by the two existing coastal water carriers, Sea-Land Service, Inc. and Seatrain Service, Inc.;

3. That the reduced TOFC rates at issue apply only from and to points effectively served by the

coastal water carriers and that rates to and from other points have not been reduced;

4. That the water carrier services are inferior to the rail TOFC service and the water carriers cannot compete at equal rates with the rail TOFC services;

5. That the reduced TOFC rates at issue cover the railroads' out-of-pocket costs in all instances and their fully distributed costs in many instance;

6. That with respect to the particular 66 TOFC rates at issue, Sea-Land Service is in the great majority of cases the "low cost" carrier;

7. That the reduced TOFC rates at issue are part of a program of rail rate reductions which threaten the continued existence of the coastal water carriers.

The railroads contended that the enactment of Section 15a(3) of the Interstate Commerce Act has established a "new rule of rate making" under which the Commission is required to permit reduced competitive rates upon a showing that they exceed out-of-pocket costs unless (1) the competing modes are already in the throes of a destructive rate war or unless (2) it can be shown that the high cost mode has the specific intent to destroy the low cost mode.

The rationale of the report of the majority of the Commission may be summarized as follows:

1. The maintenance of domestic coastwise shipping is in the national interest and required by the national defense, as the Commission and Congress have found;

2. If the domestic coastwise industry is to attract traffic it must be permitted to assess rates lower than those via railroad; the record shows that the industry must maintain rates 6 per cent below the competitive rail TOFC rates in order to participate in the traffic;

3. If the domestic coastwise industry is to survive it must on an overall basis recover its full costs of operation;

4. The proposed reduced railroad TOFC rates under consideration, which accord the water carriers no rate differential, are an initial step in an overall program of rate reductions that threaten the continued operation of the coastwise carrier industry;

5. Therefore, in the premises, the proposed reduced railroad TOFC rates are unreasonably low, and competitively destructive, to the extent that they are below a level 6 per cent higher than the present water carrier rates.

The Commission also found, with no dissents on the point, that the Pan-Atlantic service is the low-cost service vis-a-vis TOFC.

In practical effect the court below holds that under the provisions of Section 15a(3) of the Interstate Commerce Act the Commission may not condemn a reduced railroad rate that returns fully distributed costs unless it is found that the competing water carrier services are "in general" the low cost mode and that value of service considerations demand water carrier rates on particular movements which each return to the water carriers more than their fully dis-

tributed costs; and unless as to the particular movements involved the water carrier is the low cost carrier, on a fully distributed cost basis.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This is a case of first impression. It is understood to be the first occasion that this Court has been asked to construe the provisions of subsection 15a(3) of the Interstate Commerce Act (49 USC 15a (3)), the so-called "rate making rule" enacted by the Congress in 1958. The proper construction of this subsection has been, and is, the subject of substantial controversy between the railroads on the one hand and other carrier modes on the other. Basically the question is whether or not as claimed by the railroads, including the appellees here, this subsection effects a radical change in the rate making rules and standards of the Interstate Commerce Act and supersedes the application of all other rules or standards in proceedings where intermodal rate relationships are involved. The railroads contend that it does, and that the Interstate Commerce Commission is substantially restricted by this subsection in its power to condemn as unreasonable and unlawful rates reduced to meet the competition of another mode of carriage. The appellant water carriers and the Government contend, on the other hand, that subsection 15a(3) merely supplements and complements the other rate making rules and standards set forth in the Act, and that it must be considered in conjunction therewith and with the National Transportation Policy, which is specifically referred to therein.

Upon the resolution of this controversy depends the future of what remains of the domestic coastwise water

carrier industry; upon it will no doubt hang the question of whether this industry will survive or perish.

1. The Court below errs in holding that the Interstate Commerce Commission is compelled to decide intermodal rate contests solely on the basis of relative carrier costs.

In its role as regulator of the rate making activities of the various forms of transportation subject to its jurisdiction the Commission has the task of accommodating its regulatory functions not only to each of the provisions of the Interstate Commerce Act but also to the statements of policy set forth in the National Transportation Policy. That policy calls in part for the administration of the Act so as to recognize and preserve the inherent advantages of each carrier mode; to promote adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preference or advantages, or unfair or destructive competitive practices—"all to the end of developing, co-ordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States * * * and of the national defense." The policy specifically provides that "All of the provisions of this act shall be administered and inforced with the view to carrying out the above declaration of policy."

In its implementation of the rate making provisions of the Act, the Commission is called upon to exercise a high degree of expertise. *Virginian Ry.* v. *United*

States, 272 U.S. 658, 665-6. In the area of intermodal rates, for example, it must carefully weigh in the balance the interests of the various carriers involved, and of the shipping public. It must determine what standards to apply, and which to emphasize, in determining the reasonableness and lawfulness of carrier rates.

The traditional rate making standards or criteria that have evolved over the years of Commission regulation are several. One of the oldest is so-called "value of service." Value of service, as a valid rule of rate making, was recognized by this Court in *B & O Railroad Co.* v. *U. S.*, 345 U.S. 146.

Competitive need for rate reductions is another factor that has traditionally been considered, among others, in the Commission's determination of the reasonableness and lawfulness of reduced carrier rates. Competitive need takes into account the relative worth or value of the services to the shipping public, the less valuable service usually requiring some rate incentive in order to compete for the traffic. Traditionally water carrier service, being less frequent and slower than the railroad service, has required differentially lower rates in order to be competitive, as the Commission has found in its report here at issue. See also *Liquefied Petroleum Gas, Cincinnati, Ohio, and Ludlow, Ky.*, 284 I.C.C. 445, 559.

"Cost of service" is another of the traditional standards applied by the Commission in its adjudication of rate proceedings. Rates which do not return at least something in excess of the publishing carrier's out-of-pocket costs are generally found unlawful on the theory that the maintenance of rates on a lower

basis would be inimical to the interests of the carriers, the shippers and to the public welfare. Although *relative* carrier costs have been given consideration in rate making in proper cases, never has the Commission held relative costs to be the sole, or even the primary, measure of lawful rate relationships. As the Commission stated in *Class Rate Investigation, 1939*, 262 I.C.C. 447, 693 "neither do they (relative costs) control the contours of rate sales or fix the relations between rates or between rate scales. Other factors along with cost must be considered and given due weight in these aspects of rate making."

It appears to be the basic philosophy of the court below that the last named standard of rate making, "relative cost", has become the controlling, if not the sole, standard for invocation by the Commission in intermodal rate controversies since the enactment of Section 15a(3) of the Interstate Commerce Act in 1958. Although giving lip service to other standards, such as value of service, the court nevertheless makes it clear that as it reads that subsection of the Act no carrier shall be foreclosed from reducing its rates to compensatory levels to meet the competition of a carrier of another mode unless the other carrier has "in general" lower costs, and also lower costs on the particular traffic involved. We submit that Section 15a(3), particularly when read in the context of its legislative history, permits of no such interpertation.

Section 15a(3) provides in essential part that rates of a carrier should not be held up to a particular level to protect the traffic of any other mode of transportation "giving due consideration to the objectives of the national transportation policy declared in this Act." As noted one of the objectives of the national trans-

portation policy is the prevention of unfair *or* destructive competitive practices.

The Commission found in the report under consideration that the rates at issue were published to apply only between points served by the protestant water carriers; that they would deprive these water carriers of the ability to participate in the traffic; that they were an initial step in a program that, if unchecked, will lead to the extinction of the competing water carrier industry; that the publication of the railroad rates at issue constitutes destructive competition. The Commission in these circumstances properly heeded the injunction of the National Transportation Policy, as well as other relevant provisions of the act, and found the proposed rail rates unjust and unreasonable. As this Court pointed out in *New York* v. *United States*, 331 U.S. 284, 346:

> "These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920."

The holding of the district court that Section 15a(3) has completely divested the Commission of discretion in intermodal rate controversies, and of the right to exercise its discretionary power to control destructive competition between carriers of different modes, is clearly in error.

2. The lower court has failed to give consideration to the economic and military importance of the coast-

wise water carrier services, as evidenced by the legislative as well as the executive branches of the government.

By a series of findings that have not been challenged the Commission concluded that the end result of the effectiveness of the reduced rail rates at issue would be the probable extinction of coastwise water services. (313 I.C.C. 47) The Commission recognized a legislative intent to foster and preserve these services, when efficiently operated, if necessary through the allowance of differentials under the competing rail modes to compensate for service inferiority (49 US 907(f); 905(c); 907(d)) (313 ICC at 49). The Commission further recognized Congressional and other authoritative expressions concerning the primary importance of domestic coastwise service to the national defense as well as to the national economy (313 ICC at 47, 48).

But the lower court deprecates the Commission reliance upon the "national defense" clause of the National Transportation Policy, holding that this is a "hoped for" end and is not stated "as an operative policy or means." The court held that even if the national defense portion of the Policy were deemed to conflict with other portions thereof "we think it not proper to disregard the more recent expressions of Congressional intent contained in Section 15a(3)." Moreover the court minimized the importance of expressions by the U. S. Maritime Administration and of a Senate committee with respect to the importance of coastal shipping to the national defense, on the ground that these expressions were made in the past and have not resulted in legislation; that "whatever its relevance in 1950 it (the Senate report) must yield to the specifications of the 1958 Act" (p. 23).

The court below, with respect to the shipper evidence before the Commission indicative of a need by the general public for the service of the coastwise water carriers, held that should the Commission "heed the statute and allow the reduction (in rail rates) any need for these services may well disappear."

We submit that in ignoring the plain legislative intent to foster and preserve efficiently operated domestic coastwise water services in the public interest, and to protect those services from competition that will destroy them, the lower court has erred.

3. The court below erred in ignoring the statutory burden of proof that rested with the railroads.

Under the provisions of 49 USC § 15(7) "the burden of proof shall be on the carrier (who seeks a rate change) to show that the proposed changed rate * * * is just and reasonable." If as the court below appears to hold, relative costs are to be the controlling consideration here, then a part of the railroads' burden of proof is showing that they, the railroads, are in fact the low cost carriers vis-a-vis the protesting water carriers. The court holds, however, that "it is for the protestant to show its costs" in these circumstances. Protestant Sea-Land did in fact show its costs with respect to all of the competitive movements involved, showing that it is in virtually all instances low cost, and the apparent holding of the court to the contrary is in error.

At all events, if in fact proposed reduced carrier rates published under the circumstances obtaining here need be justified on the ground that the publishing carriers are the low cost mode, clearly the establishment of that fact is part and parcel of the statutory burden

of proof. The court below erred in shifting that burden to the protesting water carriers.

To summarize, in net effect this Court will be called upon to decide whether the enactment in 1958 of Section 15a(3) of the Interstate Commerce Act compels the Commission to approve selective, and substantial, competitive rate reductions by the railroads the end result of which will probably be the elimination of another carrier mode, i.e., the coastal water carriers, absent a finding that the latter are the low cost carriers, in general as well as with respect to the particular rates at issue.

The Court below has held that under the provisions of Section 15a(3) relative carrier cost is controlling in intermodal rate controversies; that the lower cost mode ("in general" and particularly) is entitled to the lower rates, irrespective of the relative values of the respective services, irrespective of whether or not the application of this principle will spell the extinction of the higher cost mode, and irrespective of the provisions of the National Transportation Policy calling for the preservation of water carrier services and enjoining against destructive competition in rate making. The court below would thus relegate the Commission to the role of a computer of costs in the performance of its intermodal rate making functions. The "flexibility in rate making," the need for which was emphasized by this Court in *Baltimore & Ohio, supra,* would thus disappear. Granted that Section 15a(3) may have changed the emphasis in intermodal rate making so that carrier costs should be given more weight than in the past, it is nevertheless submitted

that this subsection does not make relative cost the *sole* consideration, as its legislative history plainly reveals and as the Commission has properly recognized.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance, and it is urged that jurisdiction be noted, and that the decree of the court below be reversed in respect to the issues and the questions raised by this appeal.

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May 8, 1962

APPENDIX

National Transportation Policy [49 U.S.C., Preceding §§ 1, 301, 901, and 1001]

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transporation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Sec. 15a(3) [49 U.S.C. 15a(3)]

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

Section 15(7) [49 U. S. C., § 15]

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding had not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund,

with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.